No. 89-152

In The

Supreme Court of the United States

October Term, 1989

VERA M. ENGLISH,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF PETITIONER VERA M. ENGLISH

M. TRAVIS PAYNE*
EDELSTEIN, PAYNE & NELSON
P.O. Box 12607
Raleigh, NC 27605
(919) 828-1456

ARTHUR M. SCHILLER
Attorney at Law
Suite 430
1920 N Street, N.W.
Washington, DC 20036
(202) 857-5658

**Counsel of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should an employee's well-recognized and well-founded state tort action that does not in any way address issues of nuclear regulation or safety, be pre-empted by Section 210 of the Energy Reorganization Act, 42 USC Section 5851, the so-called nuclear "whistleblowers" statute?

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REPORT OF OPINIONS

The Order of the District Court is reported at 683 F.Supp. (E.D.N.C. 1988). It is reproduced in the Appendix to the Petition for Certiorari beginning at page 6a. The Opinion of the Court of Appeals is reported at 871 F.2d 22 (4th Cir. 1989). It is reproduced in the Appendix to the Petition beginning at page 1a.

JURISDICTION

The Opinion of the Court of Appeals was decided and entered on April 3, 1989. A Petition for Rehearing and Suggestion for Rehearing *en banc* was denied and entered on April 28, 1989. (Pet. App. 4a) Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, the Employee Protection or "whistleblower" provision of the Atomic Energy Act, is the statute relied upon by the lower courts in finding that Ms. English's common law tort action for intentional infliction of emotional distress is pre-empted. That statute was set out in full at the beginning of the Petition for Certiorari. As it is somewhat lengthy, it is set out in the Appendix to this Brief, rather than here.

STATEMENT OF THE CASE

Vera English was born in Maine in 1925. She grew up in that state, received training in the medical field, and worked there as a licensed practical nurse for a number of years. She also received training in medical laboratory techniques, was certified as a medical technologist, and worked in the medical field.

In 1960 Ms. English moved with her husband to Wilmington, North Carolina. From 1960 to 1972 she

worked in a variety of laboratory positions in medical and technical facilities. During this period she received additional training and education in the field of chemistry and laboratory procedures. In November, 1972, she was hired by Defendant General Electric (G.E.) to work in the Chemet Lab at its Wilmington nuclear fuel processing facility, performing chemical analyses on radioactive materials placed in nuclear fuel rods, to assure the quality of the materials.

The radioactive materials that Ms. English worked with presented a substantial safety hazard to her and her co-workers. They also presented substantial hazards to the general public, first if they got out of the plant and contaminated areas in and around Wilmington; and, second once they were incorporated into nuclear fuel rods and placed in nuclear power plants, if the material and rods were substandard.

Being concerned about the hazards these radioactive materials presented, prior to 1984 Ms. English had reported a number of safety and quality concerns, both to management personnel of Defendant as well as to officials of the Nuclear Regulatory Commission (NRC). (Pet. App. 33a) Those complaints had been largely ignored and Ms. English had been disparaged and derided as paranoid by officials of Defendant for making such complaints. These same officials demanded that she provide additional proof of any violations she alleged. (Complaint ¶ 9; J.A. 11) In February, 1984, Ms. English again reported safety hazards and illegal practices to the NRC as well as to management personnel. (Complaint ¶ 10 & 12; J.A. 11)

Following these complaints Ms. English continued to observe lax safety procedures as well as radiation contamination which had been left by other workers about her workplace. (Complaint ¶ 13, 14 & 15; J.A. 11-12) Finally on March 10, 1984, Ms. English decided that the only way to convince management personnel of the legitimacy of her concerns was to leave some of the contamination that other employees had left at her work station, so that she could show it to her supervisor. As her supervisor would not be on duty with her until March 12, 1984, she marked some of the contamination with red tape and left it, cleaning up the remainder of the contamination she had found. (Complaint ¶ 16 & 17; J.A. 12-13) As a result of Ms. English's complaints and her persistence, work in the lab was ultimately stopped for a clean up. (Complaint ¶ 18; J.A. 13)

From the time that Ms. English marked the contamination on March 10th, until she was able to show it to her supervisor on March 12th, several other shifts worked in the Chemet Lab. None of the employees on any of the other shifts cleaned up the contamination or brought it to the attention of supervisors. (Complaint ¶ 17; J.A. 13) In spite of the fact that employees on at least two other shifts had observed the contamination and failed to clean it up, no action of any kind was undertaken by Defendant with respect to any workers on those shifts. (Complaint ¶ 27; J.A. 15)

On March 15, 1984, Ms. English was falsely charged by Defendant with five violations of company or NRC requirements. (Complaint ¶ 19; J.A. 13) At that time she was removed from the Chemet Lab under guard as if she were a criminal [Complaint ¶ 24(a); J.A. 14] After an

internal company appeal, all charges against Ms. English were dropped except the claim that she failed to clean up radiation contamination. (Complaint ¶ 20; J.A. 14) On the strength of that one allegation, and without taking disciplinary action against other workers who had observed the same contamination, Ms. English was permanently removed from her position in the Chemet Lab, given a menial "make-work" position, and barred from any controlled areas in the plant. (Complaint ¶ 21; J.A.14)

On April 30, 1984, Ms. English was advised by Defendant that she would have to bid for any suitable position in the plant that became available in a non-controlled area, and that if she did not obtain such a position within 90 days, she would be discharged. As no such position became available within the time limits set by Defendant, Ms. English was discharged on July 30, 1984. (Complaint ¶ 25 & 26; J.A. 15) During a period of at least four and a half months leading up to her discharge, Ms. English was humiliated and harassed, never given any meaningful work, subjected to requirements and "rules" that were not applied to other employees, placed under constant surveillance by management, and completely isolated from her fellow employees to the point of not even being allowed to eat her lunch in the company lunch room with fellow workers. [Complaint ¶ 5, 19, 21(c), 24(b), 24(c) & 26; J.A. 9, 14, 15]

As a result of Defendant's treatment of Plaintiff before her discharge, Ms. English suffered and continues to suffer from a severely depressed and emotional condition. (Complaint ¶ 36, 37 & 38; J.A. 18) Although she has

made diligent efforts to find other comparable employment, her efforts have been unsuccessful, causing her to become impoverished. (Complaint ¶ 35; J.A. 18)

Following her discharge, Ms. English filed a complaint with the Department of Labor on August 24, 1984, pursuant to Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851. (Pet. App. 31a)[1] The Department of Labor conducted an initial investigation and concluded that G.E. had discriminated against Ms. English. (Pet. App. 31a) Both G.E. and Ms. English appealed that determination, and after an extensive hearing before an Administrative Law Judge, a decision favorable to Ms. English was issued on August 1, 1985. (Pet. App. 30a)

The Administrative Law Judge concluded that G.E.'s "witnesses were not believable in attributing the discipline" imposed on Ms. English to safety considerations aroused by Ms. English's so-called " 'deliberate' violation of the clean-up rule." (Pet. App. 42a-43a) The Judge found that "The one rule that Mrs. English technically violated . . . was a pretext for getting rid of an employee who would not stop reporting violations to NRC." (Pet. App. 43a)

In addressing the defense asserted by G.E. that Ms. English had violated safety rules and should not be entitled to the protection afforded by Section 210, the Judge concluded:

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[1] Although the NRC regulates all matters of radiation and nuclear safety, Congress gave the responsibility for implementing and enforcing Section 210 to the Secretary of Labor. 42 U.S.C. § 5851(b).

> I do not consider that Mrs. English deliberately caused a violation [as required by Section 210(g)] under the circumstances of this case. . . . Her outlining of the results of some other person's negligence and failure to clean up was in effect, at the same time, a notice to management and a warning to fellow workers of the visible contamination. . . . Mrs. English, as heretofore stated, knew that she could expect no credence to her complaints without tangible evidence. In demonstrating the malfeasance of others, she took the only means available to provide visible proof to support her past and immediate allegations. . . . This was not an act done deliberately to invoke "whistleblower" protection, rather it was a means of reporting violations, albeit unorthodox.

(Pet. App. 44a-45a) As the Judge pointed out, the company's contentions would allow G.E. to "have it both ways"; i.e., to insist on visible proof of an alleged violation, while at the same time requiring employees to eradicate all such proof or face discipline and discharge, thereby "defeating the purpose of the act." (Pet. App. 44a-45a)

The Administrative Judge ordered Ms. English reinstated and awarded her substantial damages (Pet. App. 55a). However, that order was overturned by the Secretary of Labor on January 13, 1987, on the grounds that Ms. English's complaint was untimely filed. The ruling, at least with respect to her discharge, that Ms. English's Section 210 complaint was untimely filed has been affirmed by the Fourth Circuit. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988).

This action was filed on March 13, 1987, in the United States District Court for the Eastern District of North

Carolina. It is a diversity action in which Ms. English asserted tort claims under North Carolina law for wrongful discharge and intentional infliction of emotional distress. Ms. English also asserted claims for punitive damages associated with each of the two tort claims, seeking 5% of Defendant's net worth. (J.A. 21) On or about May 5, 1987, without filing an answer, Defendant moved to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6). (J.A. 23)

On February 12, 1988, the Honorable F.T. Dupree, Jr. entered an Order ruling on Defendant's motion. In that Order Judge Dupree concluded that Plaintiff had not stated a good cause of action for wrongful discharge, and granted Defendant's motion pursuant to Rule 12(b)(6) with respect to that claim (Pet. App. 25a); however, Judge Dupree concluded that Plaintiff *had* stated a good cause of action for intentional infliction of emotional distress, and denied Defendant's motion pursuant to Rule 12(b)(6) with respect to that claim. (Pet. App. 27a) Judge Dupree also analyzed the impact of Section 210 of the Energy Reorganization Act and concluded that that provision was an exclusive remedy for Ms. English, pre-empting all of her state tort claims. He therefore granted Defendant's motion pursuant to Rule 12(b)(1) with respect to both of Plaintiff's tort claims. (Pet. App. 23a, 28a-29a)

From this Order and Judgment Plaintiff filed a timely notice of appeal to the Fourth Circuit Court of Appeals, pursuing an appeal solely with respect to her claim for intentional infliction of emotional distress. Defendant cross-appealed with respect to Judge Dupree's ruling that Plaintiff had stated a good cause of action under North Carolina law for infliction of emotional distress. On April

3, 1989, the Fourth Circuit issued its decision. It rejected Defendant's cross-appeal and affirmed the ruling that Ms. English had stated a good cause of action for intentional infliction of emotional distress. However, the Court also affirmed the ruling that Ms. English's tort claim was pre-empted by the "whistleblower" provisions of the Energy Reorganization Act, 42 USC § 5851 (Pet. App. 3a) The decision of the Court of Appeals was a *per curiam* opinion, and did not elaborate on the rulings of the District Court.

On April 14, 1989, Ms. English filed a timely Petition for Rehearing with the Fourth Circuit. By order of April 28, 1989, that Petition was denied. (Pet. App. 5a) A Petition for Writ of Certiorari was filed with this Court on July 27, 1989. That Petition was granted on January 22, 1990.

SUMMARY OF ARGUMENT

Proper application of this Court's standards for finding the implied pre-emption of state common law actions by federal statutes leads to the conclusion that the decisions of the lower courts should be reversed. Those decisions ignored the teachings of this Court that pre-emption of state law is not favored, that the intent of Congress to pre-empt state laws must be clear and compelling, and that the courts need to respect the principle of federalism by harmonizing state and federal actions where possible, rather than looking for "conflicts" as an excuse to pre-empt the state law. In addition, the decisions of the lower courts ignored the requirement of this

Court that if pre-emption is to be inferred by conflicts between the state and federal actions, those conflicts must be actual and substantial, and not just hypothetical and speculative. As there is no compelling evidence of a Congressional intent to pre-empt common law tort actions, and there are no substantial and actual conflicts between Section 210 of the Energy Reorganization Act and a common law action for intentional infliction of emotional distress, the rulings of the courts below should be reversed.

The holding of this Court in *Pacific Gas & Electric Co. v. Energy Resources Commission*, 416 U.S. 190 (1983), that state regulation may affect nuclear installations, as long as the purpose is something other than nuclear or radiation safety, also requires reversal of the lower courts' decisions. Likewise, the recognition in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), that an award of punitive damages arising out of lax radiation controls and resulting radioactive contamination of an employee, does not require pre-emption, also compels reversal in this case.

The Congressional purpose underlying Section 210 was to encourage nuclear employees to come forward with information about problems at the facilities in which they worked, and to give such employees added protection. State common law actions, like the claim for intentional infliction of emotional distress by Ms. English, support this purpose. If such common law actions are to be pre-empted by Section 210, the result will be that employees concerned about nuclear safety will actually have less protection, and will be less likely to come forward with their information, than if Section 210 had

not been enacted. Thus pre-empting the common law action for intentional infliction of emotional distress in this case contradicts the purpose of Congress in enacting Section 210 of the Energy Reorganization Act, and for this reason also the decisions below should be reversed.

ARGUMENT

I. A FUNDAMENTAL INTEREST OF THE STATE IS ADDRESSED THROUGH THE COMMON LAW ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Vera English's claim before the Court is not that she was wrongly discharged, rather it is that officials of Defendant intentionally and maliciously subjected her to uncivilized conduct for a period of at least some four and a half months before she was finally discharged.[2] The outrageousness of this conduct is shown by the fact that Defendant specifically argued at the trial before the Department of Labor Administrative Judge, " . . . that Mrs. English was a high-strung, nervous woman with marked and emotional reactions . . . ". (Pet. App. 41a) In fact, this was the "chief defense" of Defendant at that hearing. *Id.* That Defendant, knowing Ms. English to be a "high-strung, nervous" individual, would subject her for a period of some four and one half months to the type of conduct alleged in the complaint, indicates the malicious and outrageous character of Defendant's actions that

[2] Both the District Court (Pet. App. 27a) and the Court of Appeals (Pet. App. 3a) concluded that Petitioner stated a good cause of action for intentional infliction of emotional distress under North Carolina law.

Plaintiff seeks to remedy in this action. As set forth in the *Restatement of Torts, Second*:

> The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is particularly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become *heartless, flagrant,* or *outrageous* when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.

Restatement, § 46, Comment f (emphasis added).

Not only has Defendant seemingly admitted the intentional and malicious nature of its conduct, there is also little question but that Defendant's actions resulted in the infliction of serious emotional distress on Ms. English. Thus the Administrative Judge found that Ms. English suffered emotional problems as a " . . . cumulative effect of various stressful occurrences that [she] experienced during her employment with Respondent." (Pet. App. 39a) As a result, she was awarded $70,000.00 in compensatory damages for "humiliation and mental suffering". (Pet. App. 55a)

North Carolina has recognized claims for emotional distress damages at least since 1936. In *Kirby v. Jules Chain Stores, Corp.*, 210 N.C. 808, 188, S.E. 625 (1936), the defendant's agent verbally abused the plaintiff in a profane and malicious manner on at most two occasions. These actions were found sufficient to entitle the plaintiff, who was seven months pregnant at the time, to damages. Similarly in *Crews v. Provident Finance Co.*, 271 N.C. 684, 157 S.E.2d 381 (1967), the plaintiff alleged that she was verbally abused on one occasion by the defendant's

agent, and that she became angry and upset as a result of this abuse. Again, these facts were found sufficient to support the plaintiff's claims for compensation. Although the decisions in *Kirby* and *Crews* do not expressly state that they are recognizing claims for infliction of emotional distress, this was expressly recognized in a discussion of those cases in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611, 622 (1979). Claims for the intentional infliction of emotional distress have now been recognized in North Carolina in a variety of contexts, including the employment situation. *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987).

The interest of North Carolina protected through the tort of intentional infliction of emotional distress is, quite simply, the maintenance of civilized and humane social interactions. This interest is most clearly stated in *Woodruff v. Miller*, 64 N.C. App. 364, 307 S.E.2d 176, 178 (1983).

> Fortunate it is for our people and society that such maliciously destructive and disruptive conduct is regarded as extreme and outrageous – rather than normal and acceptable – and that our law provides an orderly way for the community to disapprove of it and compensate those victimized by it.[3]

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[3] *Woodruff* involved the reinstatement of a jury verdict in the plaintiff's favor by the court, following the entry of judgment notwithstanding the verdict in the defendant's favor by the trial court. The defendant in *Woodruff* had obtained 30-year-old court documents showing that the plaintiff had been convicted of a minor crime as a result of a prank that he participated in with some other college boys. The defendant then circulated and posted those records throughout the community, causing the plaintiff great embarrassment and humiliation, as well as exacerbating a pre-existing medical condition.

Recognizing a common law action for intentional infliction of emotional distress is not an attempt by North Carolina to regulate nuclear power or radiation safety. It is not even an attempt to specifically regulate employee-employer relations as Section 210 does. Rather it is an attempt to assure civil and acceptable treatment of one member of the community by another, such that society will not be disrupted. It is available to all residents of North Carolina, and applies to the whole gamut of social interactions and experiences.

North Carolina is hardly alone in protecting and encouraging civilized social interactions through the recognition of a tort for intentional infliction of emotional distress. Essentially all of the other states have, likewise, moved to protect and encourage this interest by the recognition of the tort. *See, Restatement of Torts, Second,* § 46, and subsequent appendices.

The interest of the State in this case has nothing whatsoever to do with nuclear energy or nuclear power. Indeed, protection from the malicious and intentional infliction of emotional distress was recognized substantially before issues of nuclear technology were addressed by Congress.[4] It certainly constitutes a fundamental interest of the states, rooted in the necessity to police and control anti-social behavior. It is an interest that should not be recognized as pre-empted by this Court absent the

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[4] The decision in *Kirby, supra,* was issued in 1936. The first sustained nuclear chain reaction was carried out on a squash court at the University of Chicago in 1942. The first atomic explosion occurred at Alamogordo, Nevada in 1945. Congress passed the Atomic Energy Act in 1954.

most clear intent by Congress to engage in such pre-emption.

II. THE PURPOSE OF SECTION 210 IS TO ENCOURAGE WORKERS AT NUCLEAR FACILITIES TO REPORT PROBLEMS, AND THE TORT FOR INFLICTION OF EMOTIONAL DISTRESS SUPPORTS THAT PURPOSE

When Congress enacted Section 210 of the Energy Reorganization Act, the so-called "nuclear whistleblower's act", it indicated that it intended "to provide protection to employees of Commission licensees, applicants, contractors, or subcontractors from discharge or discrimination for taking part or assisting in administrative or legal proceedings of the Commission". H. Conf. Rep. 95-1796, 95th Cong., 2d Sess. p. 16 (1978). Congress also indicated that it wanted to insure that employees with knowledge of possible problems would notify appropriate authorities to "help assure that employers do not violate requirements of the Atomic Energy Act." S. Rep. No. 95-848, 95th Cong., 2d Sess. p. 29 (1978). Indisputably the purposes of Section 210 are furthered where employees retain the opportunity to seek redress for injuries caused by an employer's intentional infliction of emotional distress. With common law remedies available to an employee in addition to the remedies of Section 210, employers will find less incentive to devise mechanisms and defenses to evade the reach of Section 210, since the common law consequences will still remain.[5]

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[5] A "mechanism to evade the reach of Section 210" would be the notification of an employee of likely discharge some months in the future,

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If Respondent's and the lower courts' view of the pre-emptive effect of Section 210 is sustained, the wrongly-motivated employer would find less risk in retaliating

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while at the same time having officials and representatives of the company behave as if they are vigorously attempting to find the employee other work with the company, and perhaps even representing that they expect to find the employee other work before the termination date. This is exactly what happened to Ms. English. *English v. Whitfield*, 858 F.2d 957, 960 (4th Cir. 1988). Like Ms. English, most employees would undoubtedly take the company's representations about expecting to find the employee other work, as being in good faith. However, under the rationale of the Fourth Circuit in *Whitfield*, an employee who accepts the representations of a company in good faith will be barred from bringing a Section 210 action if they are discharged, because of the 30 day filing deadline in the statute. Indeed, the Fourth Circuit established a "bright line" rule that even where an employer takes steps to maintain and confirm an employee's hope that other work would be found and they would not be terminated, such action will still not estop the employer from asserting the 30 day deadline of Section 210 " . . . absent some indication that the promise was a quid-pro-quo for the employee's forbearance in filing a claim." *Id.* at 963. Thus a nuclear employer now has a relatively simple mechanism for probably avoiding all liability to an employee who reports possible problems to appropriate officials. All the employer need do is notify the employee in writing that they will be fired several months from now, but then take all steps to reassure the employee that other work will certainly be found and they probably will not be fired, as long as those steps do not reach the level of an express "quid-pro-quo". Quite obviously if G.E. is also successful in the present appeal and Ms. English is denied any possibility of a common law recovery, then nuclear employers will have a complete, foolproof mechanism for avoiding any liability whatsoever to employees who engage in the type of activity that Congress sought to encourage in Section 210.

against a safety-conscious employee, and that employee and other like-minded employees would be more reluctant to come forward with safety concerns. Indeed, under Respondent's contention that Section 210 absolutely preempts all other remedies that might be available to nuclear whistleblowers, those employees actually have less protection than they had before Congress enacted Section 210.

Two hypotheticals illustrate the situation. First, assume that Ms. English does not report any problems to management or the NRC, but is still subjected to the same outrageous conduct alleged in her Complaint. The infliction of emotional distress in this instance perhaps arises out of a situation in which she had spurned the sexual advances of a manager. Ms. English would then certainly have a common law action for infliction of emotional distress available to her. *See, e.g., Hogan v. Forsyth Country Club*, 79 N.C.App. 483, 340 S.E.2d 116, *disc. rev. den.*, 317 N.C. 334, 346 S.E.2d 140 (1986). Thus you could have two similarly situated employees, working in the same plant, experiencing essentially identical outrageous conduct and harassment, yet because of slightly different motives behind the outrageous conduct, one of those employees has a common law tort action, while the other one has no remedy.

A second example might involve two very similarly situated employees, one working in a nuclear facility and the other working in a non-nuclear facility that is not covered by any of the other federal "whistleblower" statutes. Both employees engage in the socially praiseworthy activity of reporting potential problems that exist at their

plants to appropriate government officials, and both individuals are then subjected to identical outrageous conduct and harassment. The employee at the nuclear plant, under the lower courts' ruling in this case, has no common law remedy for the outrageous conduct and harassment that she or he suffers, while the other employee in an identical situation except in a slightly different industry, has the full panoply of common law remedies available to him or her.

The decision of the lower courts in this matter actually has even more disturbing consequences. There is no clear line of demarcation to limit the pre-emption of Section 210 recognized below. If, rather than subjecting Ms. English to an emotional and mental assault, as Respondent's officials did here, they instead decided to retaliate against Ms. English for her activities by hiring some "thugs" and actually *physically* assaulting her, the decision below leaves her with no remedy for her injuries and medical bills. Nothing in the District Court's opinion suggests a way to distinguish a common law tort for assault from a common law tort for intentional infliction of emotional distress.[6] Thus, even though this Court has

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[6] There is also nothing in the District Court's opinion to distinguish the pre-emption of a common law tort from the pre-emption of a state statute. Under the District Court's rationale, particularly its finding of hypothetical conflicts with Section 210 (Pet. App. 19a-21a), employees at nuclear facilities in North Carolina may be denied the protection of at least the following statutes:

N.C.Gen.Stat. § 143-422.2: prohibition against discrimination in employment on the basis of race, religion, color, national origin, age or sex.

(Continued on following page)

held that "Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence . . . " [*Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 299 (1977)], that is certainly what the lower courts' decision in this case will do for employers in the nuclear field.[7]

The hypotheticals set forth here by Petitioner are not so "far-fetched", as this Court has relied on similar

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N.C.Gen.Stat. § 97-6.1: protection from retaliation for filing a worker's compensation claim.

N.C.Gen.Stat. § 95-130(8): protection from retaliation for filing a complaint under the North Carolina Occupational Safety and Health Act.

N.C.Gen.Stat. § 95-25.20: protection from retaliation for filing a complaint under the North Carolina Wage and Hour Act.

N.C.Gen.Stat. §§ 96-15.1 and 15.2: protection from retaliation for being a witness in an unemployment compensation hearing.

N.C.Gen.Stat. Chapter 168A: protection from discrimination in employment on the basis of being handicapped.

While the lower court's decision does not expressly pre-empt the state laws cited above, it is easy to construct hypothetical situations involving each of these statutes that might possibly conflict with the provisions of Section 210, and thus support pre-emption under the lower court's ruling.

[7] One wonders if nuclear employers could also successfully assert this alleged broad pre-emptive effect of Section 210 in the state criminal actions that might be brought following a physical assault on a safety-conscious employee?

hypotheticals in rejecting claims for pre-emption. Thus in *United Automobile Workers of America v. Russell*, 356 U.S. 634 (1958), where the plaintiff only asserted common law tortious interference with his employment, this Court posed the following hypothetical to explain the extreme consequences that could result if pre-emption were found.

> The situation may be illustrated by supposing, in the instant case, that Russell's car had been turned over resulting in damage to the car and personal injury to him. Under state law presumably he could have recovered for medical expenses, pain and suffering and property damages.

356 U.S. at 645-646. Had this Court held the tort claims actually at issue in *Russell* to be pre-empted, claims arising in a similar situation but actually involving physical injury and suffering would also have been pre-empted. *See also, California v. ARC America Corp.*, 109 S.Ct. 1661, 1667 (1989). (Using the Court of Appeals' logic would lead to the pre-emption of any state-law claims against antitrust defendants.)

If, as Petitioner strongly believes, it was Congress' intent to supplement and improve the remedies available to nuclear whistleblowers when it enacted Section 210, the decision of the lower courts, as shown by the hypotheticals above, has completely subverted that intent. Given the broad pre-emptive effect accorded Section 210 by the decision below, nuclear employees who come forward with information about problems are now legally worse off than they were before the enactment of Section

210. Such an irrational and unfortunate result should not be allowed to stand.[8]

III. THE APPLICABLE LAW OF PRE-EMPTION

The easiest case for pre-emption is that in which Congress has expressly stated in the statute that it has pre-empted the area. *See, e.g., Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). However, there is no such express pre-emption provision to be found anywhere in Section 210, or for that matter in the Atomic Energy Act of which it is a part. In fact, there is an express provision of the Atomic Energy Act allowing states to regulate activities connected with atomic energy as long as that regulation is "for purposes other than protection against

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[8] As this Court stated in rejecting the pre-emption of a state statute by the Social Security Act, "We cannot interpret federal statutes to negate their own stated purposes." *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 419-420 (1973). Similarly, this Court has stated in rejecting a claim of pre-emption of state minimum labor standards under ERISA and/or the NLRA,

> It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 756 (1985). *See also, United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 666 (1954). (The 1947 amendments to the NLRA increased, rather than decreased the legal responsibilities of labor organizations by creating union unfair labor practices. However, those very provisions creating additional responsibilities and sanctions against unions, were being asserted as the basis for pre-empting the kind of activities that the 1947 amendments were designed to reach.)

radiation hazards." 42 U.S.C. § 2021(k). Thus if the common-law action at issue in this case is to be found pre-empted by Section 210, that must occur through some process of inference.

Pre-emption by implication can arise in two general ways. First, if Congress evidences " . . . an intent to occupy a given field, . . . " then any state law falling within that field is pre-empted. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), citing *Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190, 203-204 (1983). Second, a state law is pre-empted " . . . to the extent it actually conflicts with federal law, that is when it is impossible to comply with both state and federal law . . . ". *Silkwood, supra*, at 248; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

This Court has recognized that there is exclusive federal jurisdiction over the transfer, delivery, receipt, acquisition, possession and use of nuclear materials, such that the federal government maintains complete control of the safety and "nuclear" aspects of energy generation, leaving no role for the states in these areas. *Pacific Gas & Electric, supra*, at 212. However, even in the area of nuclear power generation, the states retain the ability to regulate such activity out of economic rather than nuclear safety concerns. *Id.*, at 216.[9] Yet, even with respect to

[9] The District Court correctly concluded that Section 210 was not intended to be a "regulator of nuclear safety", but was rather primarily an employee relations or employee protection statute. (Pet. App. 18a-19a) Thus the almost absolute pre-emption that applies to matters of nuclear safety does not come into play in this matter.

nuclear and radiation safety matters, the state may still play a role in the form of common law damage actions arising out of radiation damage. In this instance,

> . . . pre-emption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

Silkwood, supra, at 256.[10]

IV. PRE-EMPTION IS NOT FAVORED, AND STATE AND FEDERAL LAWS SHOULD BE HARMONIZED TO AVOID PRE-EMPTION

The State's concern expressed through the recognition of an action for intentional infliction of emotional distress is to encourage civil dealings between its citizens and discourage actions that are disruptive of society. In such areas of traditional concern to the states, like the maintenance of peace or avoidance of fraud upon their citizens, a presumption exists against pre-emption.

> When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'.

[10] This is the standard of pre-emption that the District Court ostensibly applied here. (Pet. App. 19a)

ARC America, 109 S.Ct. at 1664, quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also, Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored . . . ".); *De Canas v. Bica*, 424 U.S. 351, 357 (1976) (Pre-emption can only be justified by " . . . a demonstration that complete ouster of state power – including state power to promulgate laws not in conflict with federal laws – was the clear and manifest purpose of Congress . . . ".).

The basis for the presumption against pre-emption is grounded in our system of federalism. "Pre-emption analysis must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 19 (1987), citing *Alessi v. Raybestos-Manhattan. Inc.*, 451 U.S. 504, 522 (1981). As explained in *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977),

> This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts. (Citations omitted)

In light of the presumption against pre-emption, this Court has made it clear that it will not imply or expand limitations into federal statutes " . . . in order to enlarge their pre-emptive scope." *Metropolitan Life*, 471 U.S. at 741.

Rather than pre-empting state laws, the preference is to harmonize the federal and state acts if possible. "Where an enterprise touches different and not common interests between Nation and State, our task is that of harmonizing these interests without sacrificing either."

Union Brokerage Co. v. Jensen, 322 U.S. 202, 207-208 (1944). As stated more recently, "Our analysis is also to be tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). (Citations omitted) *See also, Askew v. American Waterways Operators*, 411 U.S. 325, 331 (1973).

Given the respect for our federalist system, this Court has ruled against pre-emption of state laws even in areas where the Constitution or the relevant federal statutes would seem to suggest pre-emption.[11] In light of this

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[11] *See, e.g., De Canas, supra.* (California statute prohibiting employment of undocumented farmworkers not pre-empted even though it may have some impact on immigration, a matter exclusively assigned to the federal government by the Constitution.) *Pacific Gas & Electric, supra.* (State economic regulation of nuclear power plants, resulting in a moratorium on the construction of such plants, not pre-empted in spite of the fact that the federal government had totally occupied the area of atomic energy and nuclear power.) *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983). (State assertion of jurisdiction over wholesale rates charged by a rural electric co-operative not pre-empted either by the Federal Power Act or the Rural Electrification Act.) *Askew, supra.* (Florida statute imposing strict liability for oil spills not pre-empted by the Federal Water Quality Improvement Act or general federal maritime jurisdiction.) *ARC America, supra.* (State anti-trust action allowing recovery of damages by "indirect purchasers", not pre-empted even though the federal anti-trust act prohibits recovery by indirect purchasers.) *Dublino, supra.* (Additional state eligibility requirements for welfare benefits, in the form of additional work and training rules, not pre-empted in the face of a very complex and pervasive federal welfare scheme.) *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). (A Maryland statute prohibiting producers of gasoline from operating retail service stations and requiring that price reductions be extended by such producers to all stations, uniformly, not pre-empted by either the Sherman Antitrust Act or the Robinson-Patman Act.) *Fort Halifax, supra.* (State mandated severance payments in the event

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need to accommodate both state and federal concerns and actions where possible, the party arguing for pre-emption must make a very strong showing to overcome " . . . the presumption that state and local regulation . . . can constitutionally co-exist with federal regulation." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985). *See also, ARC America*, 109 S.Ct. at 1665. Therefore, pre-emption of a state law will only be inferred where congressional intent to pre-empt is clear and compelling. However, the decisions below do not respect these teachings of this Court, as no clear and compelling intent to pre-empt common law actions can be shown through Congress' enactment of Section 210.

V. PRE-EMPTION IS GENERALLY NOT FOUND WHERE TO DO SO WOULD IMMUNIZE CONDUCT TRADITIONALLY RECOGNIZED AS ILLEGAL

The area of law in which the strongest preference for pre-emption exists is probably in the field of labor relations. In particular, the collective or concerted activities defined and protected by Section 7 of the National Labor Relations Act (NLRA), and the unfair labor practices defined in Section 8 of the Act are matters that are especially appropriate for uniform federal interpretation, and

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of a plant closing were not pre-empted either by the Employee Retirement Income Security Act or the National Labor Relations Act.) *Metropolitan Life, supra.* (State statute requiring a specific minimum amount of mental health care coverage in all health insurance policies not pre-empted by either ERISA or the NLRA.)

constitute areas in which state intervention or supplementation is not permitted. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986). However, even in this area where pre-emption is most favored, state common law actions are still allowed to insure that the traditional concerns of the states with respect to protecting their citizens can continue to be addressed.

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954), involved a common law tort action in state court by a company whose business was damaged by the actions of a labor organization. The defendant employed threats of violence, coupled with the appearance of a large group of men, some of them armed, at the company's work sites. This forced the plaintiff company to cease its operations. In spite of the fact that the actions complained of constituted unfair labor practices under the NLRA, the Court did not pre-empt the common law damage action. The rationale was that such outrageous conduct had traditionally been treated as illegal by the states, and there was nothing in the language of the NLRA or its legislative history to indicate that Congress intended to immunize such illegal action from state remedies.

> If petitioners were unorganized private persons, conducting themselves as petitioners did here, Virginia would have had undoubted jurisdiction of this action against them. The fact that petitioners are labor organizations, with no contractual relationship with respondent or its employees, provides no reasonable basis for a different conclusion.

Id. at 669.

Similarly, when a non-union employee was denied access to his job by violence and threats of violence during picketing and a strike at his job site, he was allowed to bring an action in state court for loss of earnings, mental anguish and punitive damages. *United Automobile Workers of America v. Russell*, 356 U.S. 634 (1958). Again, this Court concluded that the actions complained of were actionable as unfair labor practices under the NLRA, and that the National Labor Relations Board could have awarded the plaintiff compensatory damages in the form of back pay. *Id.* at 641. However, as in *Laburnum*, this Court found the case against pre-emption compelling. "There is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *Id.* at 644.

In *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), the plaintiff, an officer of a company involved in a labor dispute, brought a common law action for libel and defamation arising out of statements published during the labor dispute. Even though the events that formed the basis for the common law action might also form the basis for an unfair labor practice charge with the Board, this Court did not find it pre-empted. Concluding that a state had " . . . 'an overriding state interest' in protecting its residents from malicious libels . . . ", this Court held " . . . that a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' . . . " that it would not be proper to pre-empt it. *Id.* at 61-62. *Linn* explains that the *Laburnum* and *Russell* decisions relied on the types of conduct involved in ruling against pre-emption. "In each of these cases the 'type of conduct' involved, i.e., 'intimidation and threats of violence', affected such compelling state interests as to permit the exercise of state jurisdiction." *Id.* at 62.

Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977), like the present case, involved a common law claim for intentional infliction of emotional distress. However, the actions complained of arose out of the operation of a union hiring hall, and thus were arguably covered under Section 8 of the NLRA. Reviewing the prior cases, this Court again recognized the "overriding state interest" involved in a case such as *Farmer*, and concluded that "Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute." *Id.* at 298-299.

> No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it.'

Id. at 302. This Court went on to explain that

> The State . . . has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in *Russell*, or damage to reputation, as in *Linn*.

Id. at 302. Thus a common law action for infliction of emotional distress, including a claim for punitive damages, was allowed to proceed in the face of what may be termed "NLRA pre-emption". *Id.* at 293.

Belknap v. Hale, 463 U.S. 491 (1983), again involved a situation that may have constituted an unfair labor practice, something over which the Board had exclusive jurisdiction. The plaintiffs had been hired as "permanent" replacement employees during a strike, and had been promised in writing on several occasions that they would remain as permanent employees when the strike was over. However, in violation of these promises, the replacement workers were discharged when the strike was settled.

The fired workers brought a common law action for breach of contract and misrepresentation. In arguing for pre-emption, the company contended that burdening it with costly suits by replacement workers would conflict with the federal policy favoring settlement of labor disputes. *Id.* at 499. Yet again, because of the nature of the actions involved, this Court found no pre-emption of the state actions even in the face of a seemingly compelling federal labor relations policy.

> It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships.

Id. at 500. The conclusion in *Belknap* and the other cases discussed by Petitioner in this section was explained by this Court as follows:

> . . . a State may regulate conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to pre-empt the application of state law.

Id. at 509.

Ms. English's claim currently before this Court is the type of common law claim allowed in *Laburnum, Russell, Linn, Farmer,* and *Belknap*. Like the claims in those cases, it alleges outrageous conduct and actions, and is a claim that is "deeply rooted in local law". The interest of North Carolina in providing a remedy to its citizens for conduct of this nature is separate and "discrete" from the concerns addressed in Section 210. See *Belknap*, 463 U.S. at 512. In addition, as will be shown *infra*, the argument for pre-emption under Section 210 is nowhere near as compelling as it is under the NLRA.[12]

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[12] A rationale suggested to explain the result in *Laburnum* and the other cases, is that if pre-emption were found there would be absolutely no recovery of any sort available to the damaged parties. *See, e.g., Laburnum*, 347 U.S. at 663-664. The standard corollary to this explanation is that, where Congress has provided for at least some compensation for the damaged party, then pre-emption of the common law action is appropriate. (But see, *Russell, supra.*, where backpay was available from the Board, yet the common law action was not pre-empted.) The District Court relied on just this rationale to explain and distinguish *Farmer*. (Pet. App. 28a) However, *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), decided after the District Court's decision in this case, lays that distinction to rest. The plaintiff in *Lingle* had a significant compensatory remedy available to her. In fact, at the time the case came before this Court, the plaintiff had already received full backpay and reinstatement. *Id.* at 1879.

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VI. THE LEGISLATIVE HISTORY OF SECTION 210 DOES NOT SUPPORT PRE-EMPTION

As set forth in Section IV, above, in order for pre-emption to be inferred, congressional intent must be clear and compelling. The legislative history of the statute is an area often examined in an attempt to find such compelling congressional intent. Given the presumption against pre-emption, the statements found in the legislative history must indicate an unambiguous and clear intent to pre-empt.

Dublino, supra, presents an example of inconclusive legislative history. There the party asserting pre-emption directed this Court to a few statements in the congressional debates and committee reports in support of her pre-emption argument. However, they were fragmentary and deemed unpersuasive. "At best, this statement is ambiguous as to a possible congressional intention to supersede all state work programs". 413 U.S. at 416. Such ambiguous legislative history cannot lead to a finding of pre-emption. "Far more would be required to show the clear manifestation of congressional intention which must exist before a federal statute is held to supersede the exercise of state action." *Id.* at 417. (Citation omitted) The lack of clear and compelling legislative history showing a congressional intent to pre-empt state laws, lead this Court in *Dublino* to hold that the state statute was not

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Punitive damages were essentially the only matter at issue before this Court in *Lingle*, yet the fact of a compensatory remedy being available to Ms. Lingle was of no consequence in the pre-emption analysis. Similarly, even though Section 210 has some possibility of compensating Ms. English for her damages, that should not be a factor suggesting pre-emption.

pre-empted in spite of the very pervasive and comprehensive character of the federal statute at issue. *Id.* at 415. The lack of compelling legislative history showing an intent to pre-empt has, likewise, lead this Court to reject claims of pre-emption in other situations. *See, e.g., De Canas*, 424 U.S. at 358. (No specific indication in either the wording of the statute or the legislative history that Congress intended to preclude state regulation.); *California v. Zook*, 336 U.S. 725, 733 (1949).

Petitioner has conducted a thorough review of the legislative history of Section 210. That research has turned up nothing in the committee reports or the debates that even suggests an intention to pre-empt. The absence of any such history certainly weighs heavily against a finding that Ms. English's common law action is pre-empted.

The type of legislative history that would be required to support pre-emption is illustrated by *Pilot Life, supra.* There, both the House and Senate sponsors emphasized the breadth and importance of the pre-emption provisions being enacted. In the House, Representative Dent emphasized that federal authority would have sole power to regulate the field of employee benefit plans under ERISA. Likewise, in the Senate, Senator Williams stated that the exceptions to pre-emption were intended to be narrow, and that pre-emption was " . . . intended to apply in its broadest sense to all actions of State or local governments . . . ". 481 U.S. at 46. (Citations omitted)

At the time of the enactment of Section 210, at least 22 states had expressly recognized common law actions

for intentional infliction of emotional distress.[13] This fact also weighs heavily against a conclusion of pre-emption, as this Court " . . . generally presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller,* 108 S.Ct. 1704, 1711-1712 (1988). The presumption of congressional knowledge about pertinent law includes common law as well as statutes. *Owen v. City of Independence,* 445 U.S. 622, 638 (1980). Thus the existence of the allegedly conflicting and "pre-empted" laws in a number of states at the time that Congress enacted the federal legislation, has been cited as a significant factor by this Court particularly where the legislative history does not discuss or clearly show the intention to pre-empt those then-existing state laws. *Goodyear,* 108 S.Ct. at 1711. (At least 15 states provided remedies of the type under discussion, when Congress enacted the federal statute.); *Dublino,* 413 U.S. at

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[13] *State Rubbish Collectors Ass'n v. Siliznoff,* 38 Cal.2d 330, 240 P.2d 282 (1952); *Savage v. Boies,* 77 Ariz. 355, 272 P.2d 349 (1954); *Wiggins v. Moskins Credit Clothing Store, Inc.,* 137 F.Supp. 764 (E.D.S.C. 1956); *Cohen v. Lion Products Co.,* 177 F.Supp. 486 (D.Mass. 1959); *Knierim v. Izzo,* 22 Ill.2d 73, 174 N.E.2d 157 (1961); *Halio v. Lurie,* 15 App.Div.2d 62, 222 N.Y.S.2d 759 (1961); *Samms v. Eccles,* 11 Utah 2d 289, 358 P.2d 344 (1961); *Lyons v. Zale Jewelry Co.,* 246 Miss. 139, 150 So.2d 154 (1963); *Korbin v. Berlin,* 177 So.2d 551 (Fla.App. 1965); *Beavers v. Johnson,* 112 Ga.App. 677, 145 S.E.2d 776 (1965); *Frishett v. State Farm Mutual Auto Ins. Co.,* 3 Mich.App. 688, 143 N.W.2d 612 (1966); *Meyer v. Nottger,* 241 N.W.2d 911 (Iowa 1976); *Roshto v. Bajon,* 335 So.2d 486 (La.App. 1976); *Watson v. Franklin Finance Co.,* 540 S.W.2d 186 (Mo.App. 1976); *Bennett v. City National Bank and Trust Co.,* 549 P.2d 393 (Okl.App. 1976); *Jones v. Nissenbaum, Rudolph & Sneidner,* 244 Pa.Super. 377, 368 A.2d 770 (1977); *Harris v. Jones,* 281 Md. 560, 380 A.2d 611 (1977); *Turman v. Central Billing Bureau, Inc.,* 279 Or. 443, 568 P.2d 1382 (1977); *Moorhead v. J. C. Penny Co., Inc.,* 555 S.W.2d 713 (Tenn. 1977); *Meiter v. Cavanaugh,* 40 Colo. App. 454, 580 P.2d 399 (1978); *Sheltra v. Smith,* 136 Vt. 472, 392 A.2d 431 (1978); *Harless v. First National Bank,* 162 W.Va. 116, 246 S.E.2d 270 (1978).

414. (At the time of passage of the federal work incentive program, 21 states already had welfare work requirements as a condition of eligibility.)[14]

VII. THERE IS NO CONFLICT BETWEEN A COMMON LAW ACTION FOR INFLICTION OF EMOTIONAL DISTRESS AND SECTION 210, SUFFICIENT TO REQUIRE PRE-EMPTION

The District Court primarily relied on supposed conflicts between a claim for infliction of emotional distress and three specific aspects of Section 210: the exclusion in Section 210(g) of certain employees from the protections of the Act, the absence of a provision allowing punitive damages, and the short time limits in Section 210. (Pet. App. 19a)[15]

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[14] It is a general rule of statutory construction that a statute is presumed to be consistent with the common law at the time of its enactment, and a statute creating a new method of enforcing a right which existed before its enactment is regarded as a cumulative remedy in the absence of clear intent to make it the exclusive remedy. 2*A Sutherland Statutory Construction* Section 50.05 (4th Ed. 1984). To the extent that Section 210 provides an avenue to seek compensation for mental and emotional distress, that avenue should be treated as cumulative, given the pre-existence of such common law claims in numerous states at the time that Section 210 was enacted.

[15] The actual basis for the District Court's finding of pre-emption is somewhat confused. After discussing at some length the ways in which the court found conflicts between the three specific aspects of Section 210 and a claim for infliction of emotional distress, the court then, almost gratuitously, concludes that Section 210 "is a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement." (Pet. App. 22a-23a) (Note: Petitioner's "confusion" on the court's basis for its decision is shared by the Solicitor

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When pre-emption is to be inferred from supposed conflicts, those conflicts must be substantial and actual, and not just speculative or hypothetical. "In other words, such intent [to pre-empt] is not to be implied unless the act of Congress fairly interpreted is in *actual conflict* with the law of the State." *Savage v. Jones*, 225 U.S. 501, 533 (1912) (Emphasis added). *See also, Florida Lime & Avocado Growers*, 373 U.S. at 142-143. (Conflict occurs when compliance with both the federal and state laws is a physical impossibility.); *Jones*, 430 U.S. at 544. [Pre-emption requires the "clear demonstration of conflict . . . before the mere existence of a federal law may be said to pre-empt state law operating in the same field." (Rehnquist, J., dissenting)] "The 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' *Huron Cement Co. v.*

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General. *See*, Brief for the United States as Amicus Curiae in support of the Petition for Certiorari at p. 8, f.n. 6.) If the court's holding is truly grounded on a finding of "pervasiveness", it is not well-taken. This Court has specifically rejected an assertion that pre-emption should be inferred from the nature of a federal welfare statute whose character was far more comprehensive than that found in Section 210. "Given the complexity of the matter addressed by Congress in the federal work incentive program, a detailed statutory scheme was both likely and appropriate, *completely apart from any questions of pre-emptive intent*." *Dublino*, 413 U.S. at 415 (Emphasis added). Given the obvious intent of Congress in Section 210 to fashion a scheme that would provide relatively speedy administrative relief to an employee, it is impossible to imagine the enactment of a statute that would not have some of the attributes of a "pervasive" or "comprehensive scheme". In addition, even if Section 210 did constitute a "pervasive scheme", this Court has clearly allowed states to supplement the federal remedies, given a compelling state interest, as long as such "supplementation" does not conflict with the federal statute. *Farmer, supra; Pacific Gas & Electric, supra. See* the discussion above and the discussion in Section VIII, *infra*.

Detroit, 362 U.S. 440, 446." *Exxon*, 437 U.S. at 130. The existence of only speculative or hypothetical conflicts is not sufficient to warrant an inference of pre-emption. *Id.* at 131.

ARC America, supra, is an example of the lower courts' failure to follow the directions of this Court concerning the need for actual, not speculative conflicts in order to support pre-emption. There the District Court concluded that the state statutes " . . . are clear attempts to frustrate the purposes and objectives of Congress . . . ". 109 S.Ct. at 1664. In affirming that decision, the Court of Appeals set forth three "purposes or objectives" of the federal law at issue, and concluded that the state statute would "impermissibly interfere" with those three federal goals. *Id.* at 1664. This Court found the "conflicts" and "frustrations" relied upon by the lower courts to be speculative, and concluded that the state statute was not pre-empted.

> Indeed, taken to its extreme, the Court of Appeals' logic would lead to the pre-emption of any state-law claims against antitrust defendants, even if wholly unrelated, because the presence of other litigation could threaten the defendants with bankruptcy and reduce their willingness to settle.

Id. at 1667. *See also, Hillsborough*, 471 U.S. at 712 and 720. (The Court of Appeals found "a serious danger of conflict" between the federal and local regulations, while this Court found the alleged conflicts "too speculative to support pre-emption.")

As in the cases cited above, the "conflicts" found here by the District Court between a claim for infliction

of emotional distress and Section 210 are too speculative and hypothetical to warrant an inference of pre-emption.

A. Section 210(g) Does Not Conflict With A Claim For Intentional Infliction of Emotional Distress

Subsection (g) of Section 210 excludes an employee from the protections provided under Subsection (a) if an employee "acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act . . . ". The District Court discusses this provision at some length, and even sets forth three different hypotheticals to try to establish a conflict with common law actions. (Pet. App. 19a-21a)[16]

In its discussion of a conflict with Subsection (g), the District Court appeared to focus primarily on the fact that an employee might be reinstated by a state court, where Congress had expressly forbidden such reinstatement. (Pet. App. 21a) While a concern about reinstatement might raise the theoretical possibility of a conflict in a common law action alleging wrongful discharge, it has absolutely no application in an action alleging intentional infliction of emotional distress like the present action.

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[16] In its discussion, the court ignores the legislative history indicating that this provision is limited only to deliberate violations done to actually invoke "whistleblower" protection, rather than the absolute and all-encompassing exclusion hypothesized by the court. *See*, S. Rep. No. 848, 95th Cong., 2d Sess. 30, *Reprinted in* 1978 U.S. Code Cong. & Ad. News 7303, 7304. This legislative history was cited to the court in Petitioner's briefs, yet it is not addressed. Given that Section 210 is clearly remedial legislation which should be entitled to a broad and liberal construction under standard principles of statutory interpretation, and conversely that all limitations on the protections under such remedial legislation should be interpreted in a narrow and limited fashion, the legislative history indicating a narrow intent and purpose for Section 210(g) is particularly significant.

Petitioner does not seek reinstatement under that theory of recovery, and is not aware of any basis for claiming reinstatement under a theory of intentional infliction of emotional distress.[17]

The fundamental error of the District Court is that it did not focus on the interests being protected by North Carolina in a common law action for intentional infliction of emotional distress. As set forth in Section I of this Argument, a claim for infliction of emotional distress is not directed in any way at employers in the nuclear industry, or, indeed, specifically at the employer-employee relationship at all. Rather, it is a claim available in a variety of situations to attempt to assure that residents of the state, be they corporate or individual, will avoid subjecting other residents to outrageous and uncivilized conduct. As discussed in Section V, above, North Carolina's interest in a common law claim for infliction of emotional distress is fundamentally identical to the state interests held to be immune from the strong pre-emptive features of the NLRA in *Laburnum, Russell, Linn, Farmer,* and *Belknap.*

Once the nature of the state's interest in a claim for infliction of emotional distress is understood, it is clear that Section 210(g) has absolutely no application to such a claim and thus there could never be a conflict. The purpose of Section 210 is to afford employees additional

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[17] Petitioner strongly denies that she ever engaged in any activity that would fall within the coverage of Section 210(g). In fact, the Department of Labor Administrative Judge, after a lengthy hearing, specifically addressed Respondent's contention that Ms. English had violated a provision of the Atomic Energy Act, and specifically rejected it based on all of the evidence presented. *See*, "Statement of the Case", *supra*, at 6-7.

protections such that they will come forward with information about improper practices. The statute was never intended to authorize illegal or outrageous conduct by an employer. Even if an employee engaged in an activity that constituted a very flagrant violation of the Atomic Energy Act, at most the employer would only be justified in discharging the employee. No matter how egregious the violation done by the employee, the fundamental concepts that apply to a civilized society make clear that such action would still not justify an employer's illegal and outrageous action to subject and induce serious emotional distress in the employee. Congress certainly did not intend to authorize such illegal activity on the part of employers by enacting Section 210, and North Carolina and many other states have made it clear that they will not tolerate such outrageous and illegal conduct.[18]

B. The Absence of Exemplary Damages In Section 210 Does Not Establish A Conflict.

The District Court also relied heavily on the absence of a provision allowing punitive damages in Section 210 as creating a conflict sufficient to infer pre-emption of the infliction of emotional distress claim. Again, given the

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[18] Section 210(g) also does not create an actual conflict with a common law action asserting wrongful discharge. As set forth above, state and federal laws should be harmonized to avoid possible conflicts and pre-emption. If there were a legitimate claim of intentional violations of the Act by the plaintiff in a wrongful discharge case, the better approach would be to allow the employer to assert a "section 210(g) defense" in state court such that reinstatement would not be a remedy available to the plaintiff. *See, Norris v. Lumbermen's Mutual Casualty Co.*, 881 F.2d 1144, 1150 (1st Cir. 1989).

nature of the interests to be protected in an emotional distress action, Section 210 and the compensation available under it just has no application. In addition, this Court has made clear that "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, *see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *California v. Zook*, 336 U.S. 725, 736 (1949) . . . ". *ARC America*, 109 S.Ct. at 1667.

In the nuclear context, this Court has specifically rejected a claim that the requirement to pay punitive damages in a common law action conflicts with the purposes of the Atomic Energy Act, such that a common law claim for punitive damages is pre-empted. *Silkwood, supra.*

> Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

464 U.S. at 257. While recognizing that a primary purpose of the Atomic Energy Act is the promotion of nuclear power, this Court specifically rejected a contention that punitive damages should be pre-empted because they might frustrate Congress' desire to encourage widespread participation in the development of nuclear power. *Id.* at 257.

Equally compelling on this point is the fact that punitive damages in state actions were *not* pre-empted in *Laburnum, Russell, Belknap,* and *Lingle,* where the applicable federal provisions did not allow such damages. Because the fundamental state interests at issue in this case

are identical to those in *Laburnum* and its progeny, the absence of punitive damages in Section 210 is not compelling evidence of a need to pre-empt the state common law action.[19]

C. The Time Frames In Section 210 Do Not Support An Inference of Pre-emption

The District Court was "impressed with the speed with which charges brought pursuant to Section 210 must be resolved." (Pet. App. 22a) In particular, the court hypothesized what it apparently perceived as a compelling conflict in which, because of the longer statute of limitations for common law torts, a "catastrophe" could occur because the employee's information is not made available to the appropriate officials. (Pet. App. 23a)

The simple answer is that literally for years Ms. English had been reporting her concerns both to G. E.'s management and to the NRC. The appropriate officials were fully aware of the information that she possessed. Thus the conflict hypothesized by the District Court is most definitely of a speculative nature, and cannot support an inference of pre-emption.[20]

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[19] This court has also made clear that some level of conflict or "indirect impact is acceptable". *De Canas*, 424 U.S. at 355; *Exxon*, 437 U.S. at 133. ("There is a conflict between the statute and the central policy of the Sherman Act. . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute.") Such indirect or minor conflicts are especially tolerated where, as in this case, the conduct sought to be regulated by the state claim is "of only peripheral concern" to the federal law and is "deeply rooted in local law". *Belknap*, 463 U.S. at 509-510.

[20] In many other situations where there has been a hypothetical possibility of conflict, this Court has not found pre-emption, but has

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The reality is that most cases will arise in a context similar to Ms. English's. That is, the employee will have already conveyed her or his significant information to appropriate authorities, prior to being subjected to the types of discriminatory actions prohibited by Section 210. This is because the protection of Section 210 only applies in the following situations: 1) If an employee has already filed an action under Section 210 or some other provision of the Atomic Energy Act (the District Court's hypothetical conflict certainly could not apply here as DOL and/or NRC would certainly be aware of these actions); 2) has testified or is about to testify in such a proceeding (again the federal officials would most likely know of such testimony); or 3) has assisted or participated in some proceeding or other action to carry out the purposes of the Act. Section 210(a), 42 U.S.C. § 5851(a). In fact, the retaliation and discrimination directed at the employee by the employer might actually occur months or perhaps even years after the employee had turned over his or her information to the appropriate officials. In such a hypothetical, the time frames of Section 210 have nothing to do with preventing the District Court's "catastrophe", but are only of benefit to the employee in hopefully resolving the matter quickly.

While protecting nuclear whistleblowers is not a specific concern of the State in a claim for infliction of

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indicated that any such "conflicts" should only be addressed after a full development of the facts, such that the actual conflicts can be determined. *Arkansas Electric*, 461 U.S. at 389; *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 594 (1987); *De Canas*, 424 U.S. at 365.

emotional distress, the availability of such a remedy incidentally does provide additional protections to such employees. As discussed in more detail in Section II of this Argument, above, additional protections for employees who engage in "whistleblowing" is certainly the prime purpose of Section 210. Where the purposes of the state and federal laws are similar, this Court is even more reluctant to pre-empt the state law, and thus more tolerant of potential incidental conflicts. *Exxon*, 437 U.S. at 132-133. Thus if this Court concludes that some speculative or incidental conflict does exist between a Section 210 action and a common law action for infliction of emotional distress, arising out of the time frames of Section 210, such "conflicts" are not sufficiently compelling to require pre-emption.

VIII. REVERSAL OF THE LOWER COURT DECISIONS IS CONSISTENT WITH, AND COMPELLED BY, THE DECISIONS IN *PACIFIC GAS & ELECTRIC* AND *SILKWOOD*

In *Pacific Gas & Electric Co. v. Energy Resources Commission*, 461 U.S. 190 (1983), this Court unanimously rejected a claim of pre-emption with regard to a California statute requiring that the state must determine that an approved technology for the permanent disposal of high level nuclear waste has been developed, before additional nuclear power plants could be built. That statute was obviously passed to specifically deal with issues affecting nuclear power. In spite of this Court's unequivocal conclusion that " . . . the Federal Government has occupied the entire field of nuclear safety concerns . . . " (461 U.S. at 212), the state law was allowed to remain in effect on

the basis that it was enacted for an "economic purpose" and thus " . . . lies outside the occupied field of nuclear safety regulation." 461 U.S. at 216. This decision compels reversal of the lower courts' decisions in the present case.

The situation presented by Ms. English's common law claim for infliction of emotional distress is much simpler than the situation confronted in *Pacific Gas & Electric*. Rather than involving a state law directed specifically at issues arising out of nuclear power, or even issues arising out of the employer-employee relationship addressed by Section 210, the common law action for infliction of emotional distress applies to all residents of North Carolina in a great variety of situations. Such a state law of general application is even less likely to be subject to pre-emption, than the specific nuclear power law at issue in *Pacific Gas & Electric*. *See, Union Brokerage*, 322 U.S. at 206-208 (1944). While the North Carolina action at issue in the present case is thus less susceptible to pre-emption than the California statute at issue in *Pacific Gas & Electric*, the North Carolina cause of action arises out of the same " . . . historic police powers of the States . . . " that lead this Court to find no pre-emption. *Pacific Gas & Electric*, 461 U.S. at 206.

As discussed in Section I of this Argument, above, the purpose of an action for infliction of emotional distress is to prevent outrageous conduct by one resident of the state directed against another, in order to maintain civilized societal interactions. Like the economic purpose asserted by California, the purpose of a common law infliction of emotional distress action " . . . lies outside the occupied field of nuclear safety regulation." 461 U.S.

at 216.[21] Therefore the argument for pre-emption of the North Carolina common law action is even less compelling than the argument for pre-emption put forward in *Pacific Gas & Electric*.

The situation presented by Ms. English's infliction of emotional distress claim is also an easier case to address than the one confronted by this Court in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). In that case the tort itself involved exposure to radiation which was regulated by the NRC. Quite obviously this appears to fall within the area of absolute pre-emption set forth in *Pacific Gas & Electric*. Indeed, the award of punitive damages in *Silkwood* was based on "substantial evidence of poor training, poor security, and indifference to hazards" at the plant. *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 922 (10th Cir. 1981), *rev. on other grnds.*, 464 U.S. 238. The award of punitive damages thus represented a direct imposition of a state liability standard on nuclear safety practices, which, as a general matter, are exclusively within the domain of the Federal Government and the NRC. In addition, the case before this Court involved only the punitive damages. As such damages are, in theory, purely regulatory, the award of punitive damages on the basis described above could be said to constitute "nuclear safety regulation", which is generally the exclusive province of the NRC. *See, Silkwood*, 464 U.S. at 260-62 (Blackmun, J., dissenting).

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[21] Thus even if, in some manner, this Court concludes that Section 210 is a statute regulating nuclear safety, North Carolina's common law action for infliction of emotional distress would still *not* be pre-empted, according to the rationale of *Pacific Gas & Electric*.

In spite of the entanglement with radiation and nuclear safety concerns in *Silkwood*, this Court held that the state common law tort action, including punitive damages, was not pre-empted. Where, as in the present case, the common law tort has nothing whatsoever to do with nuclear safety or regulation, but rather arises out of the mental and emotional harassment directed towards Ms. English over the last several months of her employment, the common law tort action most certainly should not be pre-empted. To contend that Congress meant to preserve the tort action in *Silkwood*, but at the same time to pre-empt actions for intentional infliction of emotional distress like the present one, is to attribute to Congress a very strange and irrational intent. There is certainly no evidence of such a strange and irrational intent on Congress' part, thus in light of *Silkwood* Ms. English's claim should not be pre-empted.

CONCLUSION

For the foregoing reasons, this Court should rule that state common law actions which do not clearly, actually, and significantly conflict with Section 210 of the Energy Reorganization Act, are not pre-empted by that federal statute. Therefore, the judgment of the Court of Appeals should be reversed with instructions that the case be remanded to the District Court to allow it to proceed to discovery and trial on Plaintiff-Petitioner's claim for intentional infliction of emotional distress.

This the 8th day of March, 1990.

Respectfully submitted,

M. TRAVIS PAYNE
EDELSTEIN, PAYNE & NELSON
P.O. Box 12607
Raleigh, NC 27605
(919) 828-1456

ARTHUR M. SCHILLER
Attorney at Law
1920 N Street, N.W.
Suite 430
Washington, D.C. 20036
(202) 857-5658

Counsel for Petitioner

APPENDIX

SECTION 210 OF THE ENERGY REORGANIZATION ACT

42 U.S.C. § 5851. Employee protection.

(a) Discrimination against employee

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated

against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complaint (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position

together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) Review

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Jurisdiction

Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in the United States district court for the district

in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(e) Commencement of action

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Enforcement

Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28.

(g) Deliberate violations

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended.
